STATE AND FEDERAL REGULATION OF RATES.—Hon. CHARLES F. AMIDON, in his paper, "The Nation and the Constitution," read before the American Bar Association at its meeting last summer, expressed some very radical views on the extension of federal control over the matter of railroad rates. Judge LOCHREN of Minnesota, in *Perkins et al.* v. *Northern Pacific Ry. Co. et al.* (1907), — C. C. D., Minn., 3rd Div. —, 155 Fed. Rep. 445, has expressed similar views. The position of the two judges is briefly this: the enforcement of state rates must necessarily conflict with federal rates, because if a state rate in the same direction as an interstate rate is lower than the interstate rate, it will control that rate. Judge LOCHREN gives us an illustration by naming some cities in Minnesota. If the state rate from St. Paul to Moorehead, Minn., is lower than the interstate rate from St. Paul to Fargo, North Dakota, the interstate rate will be practically a nullity, and further, that if each state fixes its own rates within its boundaries the federal rate will be controlled by the sum of the state rates.

Judge AMIDON reminds us that the local state business of our railroads is a very small percentage of their total business. From his view it then appears that our state governments, which actually control but a small proportion of a railroad's business, can control practically all the rates. Upon that ground he argues for an extension of federal control over all rates both interstate and intrastate. If Judge AMIDON'S reasoning is correct, there can be no avoiding the conclusion that state regulation of rates conflicts with interstate control and is therefore unconstitutional.

The reasoning of the two judges is very forceful. This view is no doubt occasioned by the recent development in both federal and state rate regulation. Both state and federal governments have recently been regulating rates and enforcing them. It has become apparent how difficult rate regulation is under our dual form of government. The Supreme Court, through a long line of decisions, including the Granger cases and *Wabash, etc., R. R. Co.* v. *Illinois,* 118 U. S. 557, has consistently held that the state governments have control of intrastate rates. This has been generally conceded one of the exclusive powers of the state governments. In fact, that the states retained control over commerce within their own borders is just as true as that they gave up control over matters concerning interstate commerce. It cannot be said that the carrying of goods from one point in a state to another is interstate commerce. It must be a strong argument indeed which can persuade us that the regulation of rates for such carriage is an interference with interstate commerce.

It is interesting then to see if there is any conflict between state and federal regulation of rates. Let us take the illustration of a passenger rate between two cities in adjoining states. The rate between them is an interstate rate. The purchase of a ticket between them makes the purchaser an interstate passenger. The railroad can charge the passenger the interstate rate. But suppose the same individual proposes to buy to a station near the state line and in the state in which he started his trip. In doing that he is a state passenger. The state rate controls. The government of the United States is not concerned with him. Now he descends at this station and buys a new

ticket to his destination. He probably is still within his first state. In buying his second ticket he becomes an interstate passenger. The federal rate applies to him, and he pays at that rate the rest of his way. So it seems that as soon as he undertakes a journey which is really interstate he is controlled by federal laws.

The same situation cannot easily occur in freight rates. A shipper must ship either through or not and must pay the rate that controls. Judge LOCHREN suggests that even here the railroad might be guilty of discrimination in charging less for the state haul than for practically the same length interstate haul. But discriminations work the other way. The danger seems to lie in the short haul rate being the greater. It is hard to see, then, just how these two systems of rates are going to conflict. They apply to different shipments and different trips.

It seems that we can make the situation clear in this way. We have one instrumentality, the railroad. It is doing two kinds of business—interstate and intrastate. They are distinct. They may be done by the use of one train but they still are distinct. We have the federal government telling this railroad what it shall charge in doing one thing. We have the state government telling the same railroad what it shall charge in doing another thing. How do the regulations of the two forms of government conflict? They apply to different kinds of business.

We can conceive in this same situation various ways in which state and federal regulations might conflict. If this one railroad uses the same train for both kinds of business and the federal government should prescribe one sort of safety brake for trains engaged in interstate commerce and the state government should prescribe another sort for state commerce, the two regulations would apply to the same thing—the train—and the federal regulation must control. But in the matter of rates they cannot and do not conflict.

We must not forget that states may do many things which affect interstate commerce providing they are acting for the benefit of their citizens. But this is not saying they may actually interfere with that commerce. From this source we find the doctrine of concurrent powers of state and federal governments.

There can be little doubt that federal and state rates will influence each other. Federal rates would not probably long be left higher than the sum of the state rates. Experience has shown us that the rates for the long hauls and the long distances are usually lower. Rates for short intrastate hauls would not long be higher than practically the same interstate hauls. Each will profit by the other and rates, while sometimes inconsistent, will probably soon adjust themselves. State rates must be adjusted according to revenue from state business. The roads are protected by the Fourteenth Amendment. If then the state rates are reasonable, certainly the sum of them is reasonable. If the rate of the federal government is less than the sum of the state rates, the roads still have the protection of the Fourteenth Amendment.

It is not hard, then, to separate the two kinds of commerce. One begins and ends in the state. The other crosses state lines. The state retained

control of one as much as the federal government received control of the other. It is hard to see why the federal government could encroach on the internal commerce of a state any more than the state government can take actual control of interstate commerce. The two forms of business are distinct. The powers to regulate the rates in the two forms of business are alike distinct. F. P. H.

DUTY TOWARD TRESPASSING CHILDREN WHERE A DANGEROUS ARTICLE IS LEFT IN THE STREET.—This much discussed question is once more the subject of a wide difference of opinion in a recent Michigan case. Defendant's driver left a drip wagon on the street at the close of the day's work. The wagon consisted of a platform on which a boiler was firmly fastened, on top of which was a vent hole which could be closed by means of a metal plug. When left in the street the tank was about one-third filled with drips and the vent was open. Neither the gas nor the mixture was explosive in itself, but when mixed with the proper proportion of air an explosive mixture is formed, and when brought in contact with fire an explosion will follow. Plaintiff, a boy about five and one-half years old, and a boy companion, between six and seven years old, were playing in the street and climbed upon the wagon. Plaintiff's companion dropped a lighted match in the vent hole and the tank exploded, injuring plaintiff. Plaintiff obtained a judgment in the trial court, and on error to the Supreme Court the judgment was affirmed by a divided court. *Iamurri* v. *Saginaw City Gas Co.* (1907), — Mich. —, 111 N. W. Rep. 884.

It is particularly interesting to note the equal division of the court and the decidedly opposite opinions expressed on both sides as to points involved. MCALVAY, C.J., and MONTGOMERY, CARPENTER and MOORE, JJ., for affirmative, hold (a) that an ordinance prohibiting any wagons or vehicles in the streets when not in actual use, was admissible as bearing upon the question of defendant's negligence: *Flater* v. *Fey et al.*, 70 Mich. 664; *Haines* v. *Lake Shore R. R.*, 129 Mich. 475; *Binford* v. *Johnston*, 42 Ind. 509; (b) that defendant's negligence was the proximate cause of the consequence; (c) that the action of plaintiff's companion, a child of tender years, was not an intervention of a responsible human agency; (d) that *Ryan* v. *Towar*, 128 Mich. 463, which holds that where plaintiff, an infant aged thirteen years, entered defendant's land and crawled into defendant's pumphouse and was injured in meddling with a water wheel therein, defendant was under no obligation of care towards such a trespasser upon his own *private* land and not liable for the injury, is not applicable to this present case, where defendant negligently left the drip tank standing in a *public* highway; (e) that *Powers* v. *Harlow*, 53 Mich. 507, where plaintiff, an infant of eight years, being by permission on defendant's land, found a dynamite cartridge in a common packing box among the sawdust, and proceeded to crack it on a stone and maimed himself for life, is authority for the rule that those who are chargeable with a duty of care and caution towards children must calculate upon the fact that they will act upon childish instincts and impulses and take precautions accord-